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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Specification of errors	9
Summary of argument	9
Argument	11
I. The state licensing statute, as interpreted below by the highest state court and to the extent there applied to appellant, is unconstitutional and void on the ground of its repugnance to the treaty between the United States and the Yakima Nation of Indians	11
II. The state licensing statute, as it has been interpreted and applied to appellant, is repugnant to the federal Constitution because it attempts to regulate a subject matter under the special protection and within the exclusive jurisdiction of the United States	42
Conclusion	51
Appendix	52

TABLE OF AUTHORITIES CITED

Cases:

Adams Express Co. v. *New York*, 232 U. S. 14	23
Adams v. *Tanner*, 244 U. S. 590	23
Asakura v. *Seattle*, 265 U. S. 332	18
Beck v. *Flournoy Live-Stock and Real Estate Co.*, 65 Fed. 30	49
Blansett v. *Cardin, as Guardian*, 256 U. S. 319	44, 45
Borax, Ltd., v. *Los Angeles*, 296 U. S. 10	13
Bowman v. *Railroad Co.*, 125 U. S. 465	22
Buchanan v. *Warley*, 245 U. S. 60	23
Charleston & Western Carolina Ry. Co. v. *Varnville Furniture Co.*, 237 U. S. 597	23
Chief Peter Kalama et al. v. *Brennan et al*	20
Choate v. *Trapp*, 244 U. S. 665	38
Clairmont v. *United States*, 225 U. S. 551	44
Coyle v. *Smith*, 221 U. S. 559	25, 26
Downes v. *Bidwell*, 182 U. S. 244	18
Draper v. *United States*, 164 U. S. 240	45
Ex parte Webb, 225 U. S. 663	35
Farrell v. *United States*, 110 Fed. 942	49, 50
Funk v. *County Commrs.*, 248 U. S. 399	38

Cases—Continued. Page

Geer v. *Connecticut*, 161 U. S. 519 22
Geofroy v. *Riggs*, 133 U. S. 258 18
Hallowell v. *United States*, 221 U. S. 317 ..... 45, 49
Hardin v. *Jordan*, 140 U. S. 371 13
Hauenstein v. *Lynham*, 100 U. S. 483 18
Henderson, etc. v. *Mayor of New York*, 92 U. S. 259 23
Holden v. *Joy*, 17 Wall. 211 21
In re Sanborn, 148 U. S. 222 47
Jacobson v. *Massachusetts*, 197 U. S. 11 23
Johnson v. *Gearlds*, 234 U. S. 422 ..... 35, 44, 45
Jones v. *Meehan*, 175 U. S. 1 38
Kennedy v. *Becker*, 241 U. S. 556 ..... 40, 43, 46, 47
Leisy v. *Hardin*, 135 U. S. 100 23
License Cases, 5 How. 504 18
Looney v. *Crane*, 245 U. S. 178 23
McCray v. *United States*, 195 U. S. 27 23
Makah Indian Tribe et al. v. *B. F. McCauly et al.*, 39 F. Supp. 75 20
Manchester v. *Massachusetts*, 139 U. S. 240 13
Mann v. *Tacoma*, 153 U. S. 273 13
Matter of Heff, 197 U. S. 488 48
Missouri v. *Holland*, 252 U. S. 416 18
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650 23
Nielsen v. *Johnson*, 279 U. S. 47 18
Panhandle Co. v. *Highway Commission*, 294 U. S. 613 23
Passenger Cases, 7 How. 283 18
Perrin v. *United States*, 232 U. S. 478 ..... 44, 45
Pioneer Packing Co. v. *Winslow*, 159 Wash. 655, 294 Pac. 557 ..... 4, 5
Pollard v. *Hagan*, 3 How. 212 13
Port of Seattle v. *Oregon & W. R. R.*, 255 U. S. 56 13
Prigg v. *Pennsylvania*, 16 Pet. 539 23
Quileute Indian Tribe v. *B. F. McCauly* 20
Railroad Co. v. *Husen*, 95 U. S. 465 23
Rocca v. *Thompson*, 223 U. S. 317 18
Sampson et al. v. *B. M. Brennan et al.*, 39 F. Supp. 74 20
Seufert Bros. Co. v. *United States*, 249 U. S. 194 ..... 12, 38
Shively v. *Bowlby*, 152 U. S. 1 13
Sperry Oil & Gas Co. v. *Chisholm*, 264 U. S. 488 ..... 35, 44, 45
State v. *Alexis*, 89 Wash. 492, 152 Pac. 810 4
State v. *Meninock*, 115 Wash. 528, 197 Pac. 641 4
State v. *Towessnute*, 89 Wash. 478, 154 Pac. 805 4
State v. *Wallahee*, 143 Wash. 117, 255 Pac. 94 4
The Cherokee Tobacco Cases, 11 Wall. 616 18
The Kansas Indians, 5 Wall. 737 ..... 38, 44
The New York Indians, 5 Wall. 761 44
Thomas v. *Gay*, 169 U. S. 264 18
Tiger v. *Western Investment Co.*, 221 U. S. 286 ..... 44, 45, 49

Cases—Continued. Page

United States v. *Algoma Lumber Co.*, 305 U. S. 415 47
United States v. *Belmont*, 301 U. S. 324 18
United States v. *Boylan*, 265 Fed. 165 ..... 49, 50
app. dismissed 257 U. S. 614 49
United States v. *Celestine*, 215 U. S. 278 ..... 44, 45
United States v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188 ..... 21, 22, 35, 44
United States v. *Holliday*, 3 Wall. 407 22
United States v. *Kagama*, 118 U. S. 375 ..... 21, 44, 45
United States v. *McBratney*, 104 U. S. 621 45
United States v. *McGowan*, 302 U. S. 535 ..... 35, 44, 45
United States v. *Nice*, 241 U. S. 591 ..... 38, 44, 45, 48, 49, 50
United States v. *Noble*, 237 U. S. 74 49
United States v. *Pelican*, 232 U. S. 442 ..... 35, 44, 45
United States v. *Rickert*, 188 U. S. 432 ..... 44, 50
United States v. *Sandoval*, 231 U. S. 28 ..... 44, 49
United States v. *Shoshone Tribe*, 304 U. S. 111 38
United States v. *Sutton*, 215 U. S. 291 ..... 44, 45, 50
United States v. *Thomas*, 151 U. S. 577 44
United States v. *Winans*, 198 U. S. 371 ..... 12, 14, 18, 19, 21, 22, 33, 34, 37, 38, 39, 40, 43
Walling v. *Michigan*, 116 U. S. 446 23
Ward v. *Race Horse*, 163 U. S. 504 ..... 27, 28, 33
Ware v. *Hylton*, 3 Dall. 198 18
Weber v. *Harbor Commissioners*, 18 Wall. 57 13
Williams v. *Johnson*, 239 U. S. 414 49
Winters v. *United States*, 207 U. S. 564 ..... 36, 38
Winton v. *Amos*, 255 U. S. 373 49
Worcester v. *Georgia*, 6 Pet. 515 ..... 21, 38, 44

Statutes and Treaties:

Act of February 22, 1889 (25 Stat. 676) 13, 38
Act of February 13, 1925 (43 Stat. 936) 2
Act of April 26, 1928 (45 Stat. 466) 2
Act of January 31, 1928 (45 Stat. 54) 2
Judicial Code, sec. 237(a) 1, 2
Revised Statutes, sec. 2116, 25 U. S. C. 177 43
Treaty with the Yakima Indians, April 18, 1859 (12 Stat. 951–956) 2, 3

Texts and Miscellaneous:

Cohen, Handbook of Federal Indian Law (1941), pp. 69, 91–93, 306–307 22
Constitution of the United States, Article IV, secs. 2, 3 ..... 23, 25, 26
Article VI, clause 2 ..... 11, 17, 18, 20, 21, 23, 24, 30, 31, 32, 34, 36, 42,
H. Rep. No. 1431, 77th Cong., 1st sess., p. 97 41
1 Op. Atty. Gen. 645 22

Texts and Miscellaneous—Continued.

	Page
18 Op. Atty. Gen. 232	43
Opinion of Solicitor of Dept. of the Interior, dated April 5, 1934 (54 I. D. 418)	40
Prentice and Egan, The Commerce Clause of the Federal Constitution, p. 342	22
1 Rem. Rev. Stat. Wash., 347	38
4 Rem. Rev. Stat. Wash., sec. 2266	53
7 Rem. Rev. Stat. Wash., secs. 5693, 5703	4, 5, 52, 53
Washington Session Laws (1937), ch. 149, pp. 529–534	4, 52

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OPINIONS BELOW

The majority and minority opinions of the Supreme Court of the State of Washington are reported in 7 Wn. (2d) and appear in the record at pages 16–34.

JURISDICTION

The judgment of the Supreme Court of Washington was entered April 2, 1941 (R. 38). The petition for appeal was filed (R. 43) and allowed (R. 47) on June 30, 1941. Jurisdiction to entertain this appeal is based on Section 237 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (43 Stat. 936), by the Act of January 31, 1928 (45 Stat. 54), and by the Act of April 26, 1928 (45 Stat. 466). The clause in Section 237 (a) particularly relied on is the one which refers to cases

> where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *.

Probable jurisdiction was noted by this Court on October 13, 1941.

QUESTION PRESENTED

Whether the State of Washington may constitutionally prohibit the Yakima Indians from exercising the right, secured to them by a treaty with the United States, to fish at "all usual and accustomed places" outside the Yakima Reservation, unless the Indians have first procured a state license and paid a state license fee.

STATEMENT

Appellant is an Indian ward of the United States and a member of the Yakima Tribe (R. 3), one of a confederated group known as the "Yakima Nation of Indians" which, on June 9, 1855, concluded a treaty with representatives of the United States at Camp Stevens in the Territory of Washington (R. 69–138). This treaty was ratified by the Senate on March 8, 1859, and approved by the President on April 18, 1859 (12 Stat. 951–956).

By Article I of the treaty, the Indians ceded to the United States all the land, described by metes and bounds, which they had been using and occupying from time immemorial. By Article II, however, a designated part of this tract was reserved "for the exclusive use and benefit of" the Indians;[1] and under Article III certain fishing rights were "further secured" to the Indians, partly inside and partly outside the main reservation. The latter provision, which is of special importance in this case, reads (12 Stat. 953):

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Among the "usual and accustomed places" referred to was a rock jutting out from the shorelands of the Columbia River at a place now known as Spearfish, in Klickitat County, Washington (R. 3, 55, 57, 59, 60, 61, 62). On May 6, 1939, appellant caught some salmon at Spearfish without

[1] In net totals, 16,920 square miles of land were conveyed to the United States by the Indians and 1,233 square miles were reserved under Articles I and II (R. 69).

having applied for or obtained the state license or paid the state license fee provided for in the state licensing law[2] (R. 3, 55, 57). Under the interpretation of the licensing law adopted below by the state courts appellant was required to obtain a state license and pay a state license fee before exercising his right under the federal treaty "of taking fish at all usual and accustomed places" in streams of the state which, like the Columbia River, neither run through nor border on the Yakima Reservation.[3] Failure to comply constituted a misdemeanor punishable by fine or im-

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[2] Section 5703, 1940 Pocket Part for 7 Remington's Revised Statutes of Washington. This is a codification of 1937 Wash. Session Laws, ch. 149, pp. 529–534. For pertinent excerpts see Appendix, p. 52.

[3] The same interpretation had already been adopted in several prior cases, in each instance, however, by a divided court. *State* v. *Towessnute*, 89 Wash. 478, 154 Pac. 805; *State* v. *Alexis*, 89 Wash. 492, 152 Pac. 810; *State* v. *Meninock*, 115 Wash. 528, 197 Pac. 641. See *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94. On the other hand in *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, the court had held the state licensing statute inapplicable to fishing by Yakima Indians in streams flowing through the Yakima Reservation. These interpretations are not inconsistent. They are based on the assumption that the state licensing law, being couched in general terms, should be interpreted as broadly as the state's jurisdiction or constitutional power permitted. The different results reached thus merely reflect the views of the Supreme Court of Washington that the state has no jurisdiction or power over fishing activities of Yakima Indians pursuant to the treaty in streams which flow through or border on the Yakima Reservation, but does have such power in streams which neither border on nor flow through the reservation. Adopt-

prisonment or both; and this is the crime for which appellant has been prosecuted in this case.[4]

ing this distinction in the case at bar, the state Supreme Court stated:

"We are not here concerned with the right of the Indians to take fish from the streams running through or bordering upon the reservation. * * *

"This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, insofar as their right to fish in streams flowing through or bordering upon a reservation was secured to them by a treaty similar to that above referred to. (7 Wn. (2d) 124, 127, 129; R. 17–18.)"

[4] Strictly speaking, there is no such thing under the laws of the State of Washington as the "crime of Illegal Taking and Sale of Commercial Food Fish" charged against appellant in the amended information (R. 3) on which he has been tried and convicted. Section 5703 itself, so far as relevant in this case, merely provides how licenses are to be obtained and fees paid, and specifies various fees for various types of fishing. It is equally applicable whether the fish are caught in order to be sold commercially or for any other purpose. The same is true as to Section 5693, Rem. Rev. Stat. Wash. (Appendix, p. 53), which prohibits fishing without the required license and makes it a misdemeanor for anyone to do so. The state laws do impose "catch taxes" of various sorts on fish caught for commercial purposes which appellant, in common with a vast number of other Indians in the same position, have refused to pay. (Appellant's Statement as to Jurisdiction, pp. 40–42; see also Appellee's Statement as to Jurisdiction.) But failure to pay these taxes did not on May 6, 1939, and does not now constitute a crime and the question of their validity is not directly involved in this case. Thus, there really was no necessity for the state to allege or prove the commercial character of appellant's fishing activities involved in the case at bar. However, appellant neither objected thereto nor was prejudiced thereby; and this extraneous material may now be disregarded as surplusage.

At the trial in the Superior Court of Klickitat County, Washington, Judge Stone, at the state's request (R. 6), gave the jury the following charge (R. 10–11):

INSTRUCTION NO. 4

> You are instructed that the State of Washington has the right to regulate the taking of fish within its boundaries and in streams not included in or bordering upon the Yakima Indian Reservation. You are further instructed that this right of regulation includes the right of fixing licenses and providing for penalties in the event of noncompliance with whatever regulations are enacted. You are further instructed that the defendant Sampson Tulee is subject to these regulations so long as he is fishing on streams not included in or bordering upon the Yakima Indian Reservation, and that the fact of his being a member of the Yakima tribe of Indians must not be considered so far as these regulations are concerned.

The trial judge also rejected the two instructions requested by appellant, the first being for a directed verdict in his favor and the second expressing views as to the interpretation and effect of the treaty on the state licensing statute precisely the opposite of those in the state's Instruction No. 4.

Appellant noted his objections and exceptions to both rulings and also read the following supporting statement into the record (R. 67–68):

DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS

Mr. SIMMONS. If the Court please, the Jury having withdrawn, the defendant Sampson Tulee, now objects to the Court giving Instruction No. 4 for the following reasons:

1. There is no jurisdiction in this Court nor in the State of Washington over the fishing activities of the Yakima Indians and, in particular, over this defendant, Sampson Tulee, a member of the Yakima tribe of Indians, when fishing at Spearfish, the usual and accustomed fishing place as defined by the Yakima Treaty of June 9, 1855 (12 Stat. 951):

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with citizens of the territory, and of erecting temporary buildings for curing them."

2. That said Statute, namely Section 5703, Remington's Revised Statutes of the State of Washington, upon which said amended information is based is unconstitutional and void insofar as it attempts to regulate, control, or restrict fishing at Spearfish, Washington, the location set forth in the amended complaint on file herein by the defendant, Sampson Tulee, a member of the Yakima tribe of Indians.

3. By paragraph 2 of Article III of the Treaty of June 9, 1855 (12 Stat. 951) there is allotted to members of the Yakima tribe of Indians and to this defendant, Sampson Tulee as a member of the Yakima Tribe of Indians the perpetual right to take fish in all the streams bordering upon or running through said Reservation as well as at all usual and accustomed places, including Spearfish, Washington, without interference by the State of Washington, or otherwise.

4. The fishing activities of the Yakima Indians at their usual and accustomed fishing places as defined by the treaty of June 9, 1855, which would include Spearfish, Washington, the location named in the amended information on file herein, are exclusively under Federal jurisdiction and not the jurisdiction of the State of Washington.

Defendant excepts to the failure of the Court to give Defendant's proposed instruction No. 1 for the reason that it affirmatively appears from the evidence of the plaintiff, state of Washington, that Sampson Tulee caught and sold salmon at Spearfish, Washington, which was the usual and accustomed fishing place on the Columbia River of the Yakima tribe of Indians as defined in the Yakima Indian treaty of June 9, 1855; that Sampson Tulee was not subject in fishing at said place to the regulatory laws of the State of Washington, and the verdict, therefore, should have been directed in favor of the defendant.

> The defendant excepts to the failure of the Court to give defendant's proposed Instruction No. 2 for the identical reasons given and set forth in support of the defendant's exception to the giving by the Court of its instruction No. 4.

The jury returned a verdict of "Guilty" (R. 13, 68); the trial judge sentenced appellant to a fine of $25 and costs (R. 13–14, 68); the Supreme Court of the State of Washington (R. 15, 68) affirmed the conviction by a five to three decision (R. 16–34, 38); whereupon appellant filed the present appeal (R. 43–49).

SPECIFICATION OF ERRORS

Appellant intends to urge all the errors which have been assigned (R. 45–46) except the one in paragraph 2.

SUMMARY OF ARGUMENT

I

By a treaty concluded in 1855 the United States secured to the Yakima Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Notwithstanding this treaty provision the Supreme Court of Washington has interpreted the state statutes as requiring appellant, a Yakima Indian, to procure a license before fishing at one of the "usual and accustomed places." It is appellant's position that the state statute, when so interpreted, is repugnant to the treaty and therefore

unconstitutional. Even if it be assumed that upon its admission to the Union the State of Washington acquired general power to regulate the manner in which Indians exercised their treaty fishing rights (which appellant denies—see point II), clearly the state did not have the power to impose the particular requirement here involved because it prohibits Indians from any exercise of their treaty rights unless they first obtain the state's permission and pay the required license fee and thereby conflicts with the exercise of federal powers represented by the treaty.

It cannot be urged that because fishing by white citizens is subject to state regulation the treaty confers upon the state the power to regulate Indian fishing. Prior to the treaty the Indians possessed full rights to the lands which they occupied. By the treaty they gave up their power to exclude the white citizens of the Territory from their "usual and accustomed" fishing places; but they did not thereby subject themselves to the regulatory power of a state which was not to come into existence until 34 years thereafter.

II

The right of the Yakima Indians to fish at the "usual and accustomed places" outside their reservation is a right under the special protection and guardianship of the federal government extended thereto by virtue of the provisions in the Yakima treaty and in other applicable laws

of the United States. This protective relationship placed the fishing right under the *exclusive* jurisdiction of the United States. (See cases cited at pp. 44–45.) Accordingly, the state statute, which the court below interpreted as regulating the Indian fishing right, is unconstitutional.

ARGUMENT

I

THE STATE LICENSING STATUTE, AS INTERPRETED BELOW BY THE HIGHEST STATE COURT AND TO THE EXTENT THERE APPLIED TO APPELLANT, IS UNCONSTITUTIONAL AND VOID ON THE GROUND OF ITS REPUGNANCE TO THE TREATY BETWEEN THE UNITED STATES AND THE YAKIMA NATION OF INDIANS.

We submit that appellant is entitled to a reversal because the judgment entered against him in the state Supreme Court constitutes a violation of Article VI, clause 2, of the Constitution. This clause provides that:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The state does not contend that the Yakima Indian Treaty was not made under the authority of the United States or that appellant, as a member of

the Yakima tribe, is not entitled to exercise the rights which, under the treaty, the Yakima Nation has reserved and the United States has pledged its faith "to secure" to the Yakima Indians. To the extent that the other elements essential to appellant's affirmative case have not been conceded by the state and recognized by the state Supreme Court, they are established by the decision of this Court in *United States* v. *Winans,* 198 U. S. 371. Accord: *Seufert Bros. Co.* v. *United States,* 249 U. S. 194. The *Winans* case holds that the fishing provision was appropriately incorporated into the treaty with the Yakimas and that the rights reserved under it, outside as well as inside the reservation, constitute not mere privileges or licenses to be enjoyed at the sufferance of the United States, of the state or of the owner of the property on which the "usual and accustomed" fishing places are situated, but perpetual rights *which are entitled to protection under the treaty against impairment by the State of Washington* and its grantees as well as against the United States and its grantees. The case related to an ancient Yakima fishing place not far from Spearfish and which, like the one at bar, was neither inside nor on the borders of the Yakima Reservation. The lands under and around the fishery had passed into private ownership. Title to the land between high and low water marks, on which the fishing place itself was located, deraigned from a grant by the State of Washington which had ac-

quired these shorelands by operation of law on its admission into the Union "on an equal footing with the original States."[5] Title to the abutting lands had been acquired under patents from the United States. Neither the state grant nor the federal patents referred to the Yakima treaty; nor did they make the conveyances subject to any Indian rights. Winans, the private owner, sought, by fencing his lands, to prevent the Indians from using his property as a means of approach to the fishing place. In addition, he erected a fishing wheel at the fishery itself, acting in this respect pursuant to a license granted him by the State of Washington, and thereby made it impossible for the Indians to catch any fish there even if they could have succeeded in obtaining access thereto.

The United States, as guardian of the Yakima Indians, sued in the United States Circuit Court for the District of Washington to enjoin Winans from maintaining the fence or the wheel and from interfering in any way with the fullest exercise by the Indians of their rights under the Yakima treaty. This Court, reversing the Circuit Court

[5] Act of February 22, 1889, sec. 8 (25 Stat. 676, 679). If the fishing rights provision had been omitted from the Yakima treaty, "the full proprietary right" in these lands would have passed to the state simultaneously upon its admission into the Union. *Pollard* v. *Hagan*, 3 How. 212 (44 U. S.); *Weber* v. *Harbor Commissioners*, 18 Wall. 57 (85 U. S.); *Manchester* v. *Massachusetts*, 139 U. S. 240; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Shively* v. *Bowlby*, 152 U. S. 1; *Mann* v. *Tacoma*, 153 U. S. 273; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 63; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15–17.

decree which had dismissed the suit on the merits, said (198 U. S. 371, 379, 380–384):

> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.
>
> The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. * * *
>
> * * * * * *
>
> The remarks of the court [below] clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give

the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved

rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. * * * They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.* [Italics ours.]

* * * * * *

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain

rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby,* 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. * * *

* * * * *

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

Since the case involved no attempt by the state to regulate the exercise by Yakima Indians of their property rights under the treaty, no question as to the interpretation of Article VI,

clause 2, of the United States Constitution, or as to the effect of the treaty on the state's regulatory power was presented. Consequently, the solitary sentence in the Court's opinion which relates to this fundamental question is a *dictum* uttered without benefit of argument and would in no event be sufficient in itself to foreclose consideration of this question on the merits.[6] This *dictum* does not indicate, much less "conclusively determine," as the state contends (Br. p. 36), that the United States by the Yakima treaty

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[6] That the *dictum* would not have been uttered if the Court had had occasion to give full consideration to the matter is indicated by later decisions of this Court, which swept away doubts expressed in earlier cases as to how far the treaty power could be exercised to cut down a state's police power. It had long been a subject of dispute whether there were any limitations upon the treaty-making power, and there were *dicta* implying the existence of such limits. See, for example, *Ware* v. *Hylton*, 3 Dall. 198; *License Cases*, 5 How. 504 (46 U. S.) (1847); *Passenger Cases*, 7 How. 283 (48 U. S.) (1849); *The Cherokee Tobacco Cases*, 11 Wall. 616 (1870); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890); *Thomas* v. *Gay*, 169 U. S. 264 (1892), and *Downes* v. *Bidwell*, 182 U. S. 244 (1901), decided only a few years before the *Winans* case. Nevertheless, this Court had upheld treaties inconsistent with state inheritance laws in *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879); *Geofroy* v. *Riggs*, *supra*, itself, and *Rocca* v. *Thompson*, 223 U. S. 317 (1912). And subsequent to the decision in the *Winans* case this Court has squarely held that state statutes enacted pursuant to the police power must likewise yield to exercises of the federal treaty power. *Missouri* v. *Holland*, 252 U. S. 416 (1920); *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924); *Nielsen* v. *Johnson*, 279 U. S. 47, 52 (1929); *United States* v. *Belmont*, 301 U. S. 324, 327, 330, 331 (1937).

either could not or did not cut down in any way the regulatory power which the state otherwise would have. On the contrary, the inference to be drawn from the *dictum* is that the Court recognized that this regulatory power could be and was curtailed to the extent that its exercise would be inconsistent with the full enjoyment of the fishing rights which the Court held the Yakima Indians to have under the treaty. And the very nature of these rights, as interpreted by this Court in the *Winans* case, was clearly such as to entitle the Indians to exercise them without need of obtaining further permission from or paying any further consideration to "the United States and its grantees" or "the State and its grantees." Hence, even if the state, on its admission into the Union, had acquired general power to regulate the manner in which the Indians exercise their treaty fishing rights—such as, to take the state's own example, by a regulation prohibiting the use of dynamite—it still would not have acquired any power to impose regulations which, like the ones involved in the case at bar, prohibit and punish the Indians for exercising their treaty rights at all unless they first get special permission from the state and pay a state fee in order to get it.[7] The state licensing

[7] That the state acquired no regulatory power at all follows, we submit, from the argument under point II, *infra*. The question has been decided in favor of the Indians in four cases, now pending in the lower federal courts, which relate to treaties substantially like the Yakima treaty. In

statute, being directly in conflict with rights which the United States, through an exercise of its treaty powers, has undertaken to secure to the Indians, is directly in conflict with the supreme law of the land and should to this extent have been denied, not granted, enforcement in the state courts below.

We submit, therefore, that the judgment below should be reversed because it was entered in violation of the provisions of Article VI, clause 2, of the Constitution. By that judgment, the state Supreme Court has subjected appellant to criminal punishment under the laws of the State of Washington for doing the very thing which he had a right to do by virtue of a treaty made under the authority of the United States. Instead of following the explicit constitutional mandate that they consider themselves bound by the federal treaty, "any Thing in the Constitution or

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one of these cases a permanent injunction was recently issued protecting the treaty fishing rights of Makah Indians against impairment through the enforcement of any of the regulations in the Washington Fishing Code by state officials. *Makah Indian Tribe et al.* v. *B. F. McCauly et al.*, 39 F. Supp. 75. This case is now on appeal to Circuit Court of Appeals, 9th Circuit. In *Martin J. Sampson et al.* v. *B. M. Brennan et al.*, 39 F. Supp. 74, still pending in the Northern Division, a temporary injunction has been granted. Preliminary injunctions also have been issued by the Southern Division of the United States District Court for the Western District of Washington in *Chief Peter Kalama et al.* v. *Brennan et al.*, and *Quileute Indian Tribe* v. *B. F. McCauly.*

Laws of any State to the Contrary notwithstanding," the state judges actually have considered themselves bound in this case by the state laws anything in the federal treaty and in the federal Constitution to the contrary notwithstanding.

The validity of this conclusion, to the extent that it is not apparent from the plain language of Article VI, clause 2, considered in connection with the *Winans* decision, will be strengthened, not weakened, by a reference to the arguments in the state's brief. Thus, there is no need to dispute the contentions in the state's point I so long as their application is confined to situations which involve no conflict between the state police power or an exercise thereof and an exercise of one or more of the powers granted to the federal government under the Constitution. In the case at bar, however, we are not dealing with such a situation. Here, appellant is relying on the rights secured to him under the Yakima treaty. In entering this treaty, the United States actually exercised three different sets of powers delegated to it under the Constitution—(1) its treaty powers which, as this Court has held, authorize the United States to enter into treaties with Indian tribes just as with foreign nations (*Worcester* v. *Georgia*, 6 Pet. 515; *Holden* v. *Joy*, 17 Wall. 211; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Winans*, 198 U. S. 371); (2) the power over the property of the United States (*United States* v. *Winans*,

443006—42——4

supra), and (3) the power to regulate commerce with the Indians.[8] To be relevant in the case at bar, the state's contentions in point I must be taken as suggesting that the state police power or an exercise of it must prevail over an exercise of federal power, to the extent that there is a conflict

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[8] The federal power over commerce with the Indian tribes is broader than over other commerce. 1 Op. Atty. Gen. 645; Prentice and Egan, *The Commerce Clause of the Federal Constitution*, p. 342. In *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188, 194, the power over commerce with the Indian tribes has been declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations," which, in *Bowman* v. *Railroad Co.*, 125 U. S. 465, was said to be absolute and exclusive. The fact that commerce with Indians may be wholly intrastate does not diminish the federal power over it. *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *Forty-Three Gallons of Whiskey*, *supra*. The constitutional power over commerce with the Indian tribes, as contemporaneously construed by Congress in the Indian trade and intercourse acts dating from 1789, includes the control of hunting, trapping, trespass and various other subjects not necessarily related to transportation, buying or selling. See Cohen, *Handbook of Federal Indian Law* (1941), 69, 91–93, 306–307. But even if the conception of commerce be given its more ordinary significance, the state in this case has been at the same pains to show that appellant *was* engaged in commercial fishing.

There is nothing in *Geer* v. *Connecticut*, 161 U. S. 519, which detracts in any way from the foregoing observations. In that case it was held that a state could prohibit the exportation of game despite the inhibitions of the commerce clause because the ownership of the state in game was said to be absolute. The state can assert no such absolute ownership here, since under the *Winans* decision, its property rights must be considered as having been subject to the profit *à prendre* reserved for the Indians under the Yakima treaty.

between them. Such a suggestion is clearly untenable. This Court has repeatedly held that under Article VI, clause 2, it is the exercise of federal power that must prevail and the state police power which must yield when and to the extent that the two come in conflict.* Moreover, it is now definitely settled that the same principle applies where an exercise of the federal treaty power conflicts with and therefore curtails the state police power (see note 6, p. 18, *supra*. Indeed, the case of *Prigg* v. *Pennsylvania*, 16 Pet. 539, cited by the state, is one of the classic decisions which first enunciated the doctrines of incidental federal powers and of the supremacy of their exercise over the state police power. In that case, this Court actually held a Pennsylvania statute punishing the kidnapping in the state of escaped slaves to be unconstitutional and void because it conflicted with a federal law enacted by Congress pursuant to Article IV, section 2, of the Constitution.

The contention in point II of the state's brief similarly are valid only to the extent that they are immaterial to the issues in this case, and invalid to

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* *Henderson, etc.* v. *Mayor of New York*, 92 U. S. 259, 271; *Railroad Co.* v. *Husen*, 95 U. S. 465, 471; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Walling* v. *Michigan*, 116 U. S. 446, 460; *Leisy* v. *Hardin*, 135 U. S. 100, 108; *McCray* v. *United States*, 195 U. S. 27, 60; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25; *Adams Express Co.* v. *New York*, 232 U. S. 14, 31; *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597; *Adams* v. *Tanner*, 244 U. S. 590, 594–595; *Buchanan* v. *Warley*, 245 U. S. 60, 74; *Looney* v. *Crane*, 245 U. S. 178, 187; *Panhandle Co.* v. *Highway Commission*, 294 U. S. 613, 619.

the extent that they can conceivably be considered as material.

Taken in connection with the contentions in points V and VI, it may be assumed that the state licensing statute is an exercise of the police power and for that reason not subject to successful attack under the due process or contract clauses of the Constitution by anyone whose rights are impaired by reason of its enactment and enforcement. But appellant is not attacking them on either of these grounds on this appeal. His rights are entitled to protection by virtue of a treaty made under the authority of the United States which, under Article VI, clause 2, is a part of the supreme law of the land, anything in the laws of the State of Washington to the contrary notwithstanding. It is no answer to this challenge that appellant could not in addition successfully attack the statute under the due process or contract clauses.

The gist of the state's contentions in point III is contained in the following excerpt from pages 16 and 17 of its brief:

> Under the decisions of the Supreme Court of the United States, Congress was without power to admit the State of Washington into the Union shorn of the right to protect its wild game and fish upon land and waters, otherwise subject to its jurisdiction.
>
> The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent

sovereignty imports certain inherent powers which cannot be restricted either by express provision in the Enabling Act *or by prior treaties*. If such treaties exist at the time the new state is admitted, then the admission repeals the treaty to that extent.

The pronouncements of our supreme court provide a basis for the rule which may be succinctly stated as this: Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal Constitution, and that any other attempted limitation cannot be enforced. While there are numerous decisions sustaining this principle, no case furnishes a clearer enunciation of the rule than that of *Coyle* v. *Smith*, 221 U. S. 559 * * *. [Italics ours.]

The *Coyle* case dealt exclusively with the power of Congress, under Article IV, section 3, to admit new states into the Union. It is typical of the many cases theretofore and thereafter decided by this Court which in effect have held that this particular power is subject to an implied limitation which prohibits its use as a means of preventing a newly admitted state from exercising powers or acquiring rights peculiarly local in their nature and of which the United States could not deprive the states after their admission through a valid exercise of any of its delegated powers. In the case at bar it must be admitted that the power of a state to regulate fishing in its waters is such a

power. It must also be admitted that the right of a state to proprietary ownership of the land between high and low water marks in its navigable streams is such a right. If, therefore, the federal action impairing this local regulatory power or this proprietary right were based, in the case at bar, merely upon the power of Congress under Article IV, section 3, to admit new states into the Union it could not and would not have been effective. But it was not based merely on that power. Indeed, the restrictions on the state's proprietary ownership of the shore lands on which the fishery here in question was situated results not from any provision in the Washington Enabling Act but from the provisions in the Yakima treaty into which the United States had authority to enter pursuant to at least three separate powers specifically delegated to it under the Constitution. In order to sustain its position, therefore, the state must establish that a similar limitation exists upon these powers as upon the power to admit new states or it must establish that the doctrine of equality of admission amounts not merely to a limitation on Congress' power to produce inequalities through abuse of its admitting power, but to a positive requirement that Congress see to it that every new state is admitted on a basis of absolute equality with those already in the Union.

Even in *Coyle* v. *Smith* this Court went out of its way to point out that no such extension of its

decision would be proper, saying (221 U. S. 559, 574):

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 9. *Pollard's Lessee* v. *Hagan*, *supra*.
>
> No such question is presented here. * * *

Ignoring this plain statement, the state quotes the following paragraph from page 576 of the opinion:

> In *Ward* v. *Race Horse* [163 U. S. 504], the necessary equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild

> game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

and asserts (Br., p. 19):

> We regard this statement as absolutely decisive on the point that the State of Washington acquired supreme control over its wildlife when statehood was declared. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state.

We need not dignify this assertion with any direct argument to show how far from "absolutely decisive" the paragraph on which the state relies would be even if the state has properly interpreted its meaning. But since the *Race Horse* case is one of the mainstays of the state's case and of the majority opinion below, we shall examine the facts and the opinion in that case with care in order to determine how far it supports the state's contentions. In that case, a member of the Bannock tribe of Indians, who was being prosecuted in a Wyoming court for having killed "seven elk illegally, wantonly and in excess of the number he could immediately use for food purposes" in violation of a Wyoming statute, obtained his discharge on *habeas*

corpus in a United States Circuit Court on the ground that his conduct was justified under a treaty between the United States and the tribe. The treaty provided that its members—

> * * * shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The place where Race Horse had killed the elk was part of the "unoccupied lands of the United States" within the boundaries of the State of Wyoming which had been admitted into the Union some 31 years after the entry into the treaty. This Court reversed the order and remanded the Indian to the custody of the state sheriff.

In scrutinizing the majority opinion, written by Mr. Justice White, it may be difficult to distinguish what portions of it properly should be considered part of the *ratio decidendi* and what part *dicta;* but two things certainly are clear, (1) that everything in it was directed to the single ultimate conclusion on which the decision to reverse was based, and (2) that this conclusion was that the hunting rights reserved for the Bannock Indians under the treaty came completely to an end at the very moment the State of Wyoming was admitted into the Union. The first four pages of the opinion (pp. 507–510) contain the reasoning directly leading up to the decision. This reasoning deals wholly with the question

whether the hunting rights provision, properly interpreted, should or should not be held to have expired by its own terms when Wyoming attained statehood. Starting with the words in the treaty referring to "peace * * * among the whites" and "borders of the hunting districts," the learned Justice unfolded a process of interpretation which led him, by steps whose precise nature it is not necessary to recount here, to the conclusion that the treaty actually was intended, not to give the Indians a right to hunt on unoccupied lands of the United States so long as they remained unoccupied lands of the United States, but only so long as they did not fall within the boundaries of a full-fledged state of the Union. This being so, the treaty right came to a complete end by virtue of its own provisions at the very moment the State of Wyoming was admitted to the Union, leaving the state legislature free to regulate hunting by the Bannock Indians without thereby impairing their treaty rights and hence without violating Article VI, clause 2, of the Constitution.

Thus, the Court's decision was not based on any holding that the treaty right, though continuing in existence as a mere property right after Wyoming became a state, nevertheless was "repealed" to the extent necessary to permit the state to regulate it without interference from Article VI, clause 2, of the Constitution. The same is true of the discussion in the rest of the opinion which seeks to support the Court's holding that the treaty right had

wholly ceased to exist. The opinion points out that an interpretation, under which the treaty hunting rights could continue in existence after Wyoming became a state, would cut down the state's police power and should not be adopted by the Court if some way could be found for preventing this by destroying the treaty right through a so-called process of interpretation. Here, too, the opinion assumed the very opposite of what the state asserts it held. There is not the slightest suggestion that the judges in the Wyoming courts could, without violating Article VI, clause 2, of the Constitution, have enforced the state conservation statutes against Race Horse if his hunting rights under the treaty had not, by virtue of the intention supposedly expressed in the treaty itself, gone completely out of existence the very moment the state came into being. On the contrary, the whole burden of Mr. Justice White's reasoning was that if the treaty right had not gone wholly out of existence it would, by preventing the state judges from enforcing these state conservation laws against the Indians, have cut down the power which the state legislature otherwise would have had to regulate all hunting within its borders.

Furthermore, Mr. Justice White's reasoning as to the effect of the enabling act reduces itself to the thesis that since the treaty right came to an end by virtue of its own limitations, the mere failure of Congress to say anything about the matter could not and did not serve to prevent its termina-

tion. The following excerpts from the opinion clearly show that the Court did not intend to suggest, much less to hold, that the United States could not by treaty or act of Congress create rights, prior to the admission of a state into the Union, which would survive thereafter, and by reason of Article VI, clause 2, of the Constitution cut down rights and powers which the state otherwise would have acquired by virtue of its admission into the Union on a basis of equality with the other states:

> * * * Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty-making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will,

> as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. * * *

The majority opinion in the state Supreme Court below rightly asserts that "The *Race Horse* case is strikingly like that here presented." But the same resemblance existed in the *Winans* case and was just as material to the questions there presented and decided. Whether the decision of this Court in the *Winans* case represents a direct rejection of the decision in the *Race Horse* case or whether the Court merely deemed the provisions of the Yakima treaty not susceptible to the interpretation given the Bannock treaty, the fact remains that the *Winans* case has established that the right of the Yakima Indians "of taking fish at all usual and accustomed places" outside of the Yakima Reservation "was intended to be continuing against the United States and its grantees as well as against the State and its grantees," and therefore survived the admission of the state into the Union.

The state's suggestion that it survived as a mere property right but was repealed by implication in some undefined way so as to permit the state to impair its enjoyment and exercise despite the pro-

visions of Article VI, clause 2, of the Constitution is just a novel way of repeating the contentions already dealt with that the state police power is paramount over an exercise of federal power to the extent of a conflict between them. Indeed, it represents an extension of that untenable argument, for it asserts that it is not necessary even to wait for a conflict to occur between the valid exercise of federal power and an actual exercise of state power. The mere admission of the state into the Union is enough, according to the state's argument, to invalidate every law theretofore validly enacted by Congress and every treaty validly entered into by the United States to the extent that its continued existence after the creation of the state would, because of Article VI, clause 2, prevent the state legislature from acquiring the rights and exercising the powers which it would have obtained had these laws and treaties not been in existence. This very argument was made and flatly rejected in the *Winans* case with respect to the complete proprietary ownership which the State of Washington, but for the Yakima treaty, would have obtained in the shorelands underlying its rivers. The attempt of the state to distinguish that decision, by intimating that there is some sort of hierarchy of state sovereign rights and powers according to which the state police power is a higher attribute of sovereignty than the ownership of shorelands and tidelands, requires no serious consideration in the light of the many

decisions of this Court reaching the same conclusion in cases where the police power was the attribute of sovereignty in question as in cases where other state powers or sovereign rights were involved. *Johnson* v. *Gearlds*, 234 U. S. 422; *Ex parte Webb*, 225 U. S. 663; *United States* v. *Pelican*, 232 U. S. 442. See also *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535. Furthermore, since the United States has power to cut down a state's police power by an appropriate exercise of its treaty powers when the state is already in existence (see note 6, p. 18, *supra*), the very starting point of the state's argument is itself invalid. As this Court said in *Johnson* v. *Gearlds, supra* (234 U. S. 422 at 439):

> * * * But if the making of such a treaty after the admission of the State is not inconsistent with the "equal footing" of that State with the others—as, of course, it is not—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

There are intimations in the state's brief (pp. 12, 42) and in the majority opinion of the state Supreme Court (R. 17) that appellant cannot prevail unless the Yakima treaty itself provides that his fishing rights may be exercised without compliance with state laws. This, we submit, is an erroneous

assumption. The protection of the treaty right against impairment by reason of any state law is provided for in Article VI, clause 2, of the Constitution and need not be reinforced in every instance by an affirmative provision against state regulation in the federal treaty or law covering the right.[10] This does not mean, of course, that a conflict necessarily occurs in every case where a state regulation is applied to a treaty right, for it sometimes may be proper to interpret the treaty as conferring a right or privilege which was intended to be subject to state regulation.

Thus, if the United States entered into a treaty with the Dominion of Canada in which Canadians were granted the right to fish in the part of the Columbia River where it flows through the State of Washington "in common with" the citizens of that state, and the citizens of Washington were granted the right to fish in the Columbia River where it flows through Canada "in common with" citizens of the Dominion, it might be proper to hold that the fishing rights granted to the Canadians were intended to be exercised subject to

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[10] In *Winters* v. *United States*, 207 U. S. 564, 577, this Court said:

"* * * On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

such regulations in the interests of conservation as are generally applicable under the Washington laws. While the United States would have had power to preclude the applicability of the state laws, it would be reasonable, in the absence of a specific provision, to hold that the treaty was not intended to do so. Several circumstances would combine to support such an interpretation. The situation prior to the treaty was one where citizens of Canada either had no right at all or certainly no right that was free from state regulation. The state was in existence, and its power and functions and authority well known. It, therefore, would be reasonable to assume, in the absence of a specific provision precluding state regulation, that it was not intended to grant a right free from regulation where none had been enjoyed before.

A very different situation existed, however, in the case at bar. As this Court pointed out in the *Winans* case, the Indians prior to the treaty possessed full rights of occupancy "upon the exercise of which there was not a shadow of impediment." Had the state been in existence, these rights admittedly would not have been subject to state regulation. Thus the treaty is relied on, not by the Indians as the source of their rights, but by the state as the basis for its regulatory power; and the treaty provisions must be looked at to see how far they affirmatively curtailed the Indian rights rather than how far they

granted them. Furthermore, the State of Washington did not come into existence until some 34 years after the treaty between the United States and the Yakima Nation of Indians was concluded.[11] When the treaty was entered into the Yakima Indians had not the slightest conception of state sovereignty or of the division of powers between state and federal governments under our Constitution. In such a situation, it would be fantastic to interpret their failure to provide against state regulation as indicating an intention that the rights secured to them under the treaty were to be subject to state regulation; and even if there were any room for reasonable doubt, these doubts would, under the canons of interpretation properly applicable with respect to Indian treaties, have to be resolved in favor of the Indians and in conformity with their understanding of the transaction.[12]

Furthermore, any contention that the treaty affirmatively conferred power on the Territory of Washington to regulate fishing by the Indians at

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[11] Act of February 22, 1889, 25 Stat. 676; 1 Rem. Rev. Stat. Wash., 347.

[12] *United States* v. *Winans*, *supra*; *Worcester* v. *Georgia*, 6 Pet. (31 U. S.) 515 (1832); *The Kansas Indians*, 5 Wall. 737; *Jones* v. *Meehan*, 175 U. S. 1 (1899); *Winters* v. *United States*, 207 U. S. 564 (1908); *United States* v. *Nice*, 241 U. S. 591; *Choate* v. *Trapp*, 244 U. S. 665; *Funk* v. *County Commrs.*, 248 U. S. 399; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194; *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938).

their "usual and accustomed places" in streams which neither flow through nor border on the reservation because at such places the right to fish was secured to them "only in common with the citizens of the Territory" must be rejected in the light of the interpretation of this provision of the treaty adopted in the *Winans* case. The state concedes (Br. p. 48) that the treaty cannot be considered as having been entered into for the benefit of the non-Indian citizens of the territory or as having been intended to confer any rights upon them. It is equally true that the treaty was not intended to eliminate the right of the Indians by reducing it to the level of the citizens of the territory. Thus, while it would be possible, purely as a matter of grammar, to regard the phrase "in common with citizens of the Territory" as modifying either the word "right" or the words "taking fish," the dictates of common sense, as well as the decision of this court in the *Winans* case, establish that the latter is the proper interpretation. Thus, the most that can be inferred from its inclusion in the treaty is that the Indians were giving up the right to exclude the whites from fishing on the tracts being conveyed by them to the United States, not that they were sharing their rights with the whites on the same or equal terms. Therefore, it does not follow that because fishing by the whites was subject to regulation by the territory, fishing by the Indians also was subject to such regulation. *Fish-*

ing by the Indians, being secured to them under a federal treaty, was under the special protection of the United States and hence subject to regulation, if at all, only by the Congress of the United States. Fishing by the citizens of the territory was neither secured by a treaty nor under the special protection of the United States, and was therefore freely subject to regulation by the territory. The same became true with respect to the State of Washington when it succeeded the territorial government.

The situation presented in *Kennedy* v. *Becker*, 241 U. S. 556, falls somewhere between the two extremes represented by the case at bar and the hypothetical Canadian treaty.[13] The State of New York not only was in existence but its sovereignty was, as

[13] The opinion of the Solicitor of the Department of the Interior dated April 5, 1934 (54 I. D. 418), to the effect that the Yakima Indians are not exempt, by reason of the 1855 treaty, from the provisions of the Oregon laws for licensing the sale of fish, is based upon what is now believed to have been a misunderstanding of the opinions of this Court in *Kennedy* v. *Becker* and the *Winans* case, *supra*. This opinion, however, expressly distinguished between the right to sell fish and the right to take fish. The Acting Solicitor of the Interior Department subsequently ruled that the right to take fish outside the reservation, having been guaranteed by treaty, was entitled to special federal protection and therefore that Indians were entitled to compensation, when such fishing sites were flooded by construction of the Bonneville Dam, even though non-Indian riparian owners were not so entitled. [The opinion referred to is not reported but copies have been filed with the Clerk.] Pursuant to this ruling the War Department offered, and the Tribal Council of the Yakima Reservation (by resolution dated August 9, 1939, approved on behalf

this Court took special pains to point out, well understood by the Indians. On the basis of that case, it can and should be held in the case at bar that the Yakima Indians subjected themselves to the sovereignty of the United States and that Congress can, without violating the treaty, regulate the exercise of the fishing rights secured to the Indians under the Yakima treaty. This would be true with respect to fishing inside as well as outside the reservation. But even the United States could not without violating the treaty impose the particular requirements corresponding to those provided for in the state licensing statute, for such requirements are inconsistent with the very nature of the rights secured to the Indians under the treaty. If the fishing rights provision means anything at all, it means that the Indians obtained a right to fish at their usual and accustomed places without need of further permission and without need of further payments in addition to the very substantial consideration furnished by them under the treaty itself. The United States, it is true, has power to violate the treaty; but the State of Washington does not, since

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of the Department of the Interior by the Superintendent of the Reservation), accepted proposals for lieu lands in compensation, which, at the request of the War Department, have since been embodied in the now pending bill, H. R. 5993, 77th Cong., favorably reported on November 21, 1941, by the House Committee on Rivers and Harbors. (H. Rept. No. 1431, 77th Cong., 1st sess., p. 97.) The resolution setting forth this arrangement specifies that the lands to be granted in compensation are to be held by the United States "in trust for the exclusive and perpetual use of the Indians."

this power has been denied to it by Article VI, clause 2, of the Constitution.

II

THE STATE LICENSING STATUTE, AS IT HAS BEEN INTERPRETED AND APPLIED TO APPELLANT, IS REPUGNANT TO THE FEDERAL CONSTITUTION BECAUSE IT ATTEMPTS TO REGULATE A SUBJECT MATTER UNDER THE SPECIAL PROTECTION AND WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

While the Yakima Indians had no conception whatsoever concerning the nature of state sovereignty or government, the record of the negotiations leading up to the treaty does indicate a definite realization on their part that they were dealing with representatives of the President of the United States, "the Great White Father" in Washington, that they were entering into a treaty which would have to be approved by the United States, and that this treaty provided for much more than a business transaction whereby, with specified exceptions, they were surrendering all their use and occupancy rights and receiving in return the promise of certain stipulated payments and material benefits (R. 71–137). Implicit in the very nature of the promised benefits and actually expressed in the treaty itself were the subordination by the Indians of their own sovereignty and powers as a nation to those of the United States, and the solemn undertaking by the United States to protect and secure the Indians in the exercise and enjoyment of the property rights reserved by and for them under the treaty. In this respect,

this treaty was entirely unlike the so-called treaty in *Kennedy* v. *Becker, supra,* and just like the hundreds of other treaties which the United States has made with other Indian tribes and which this Court has uniformly treated as placing the Indian property rights under the control and guardianship of the United States. In this respect, also, there is no basis for differentiating between the fishing rights secured to the Indians inside the reservation and those outside. Both, as this Court held in the *Winans* case, involved property rights; both were entitled to the federal protection which the United States obligated itself to afford under the treaty; both fall within the protective provisions of the general laws which Congress has enacted with respect to all Indian rights in land;[14] and both have been the subject of protection at the hands of the executive branch of the government from the time of the entry into the treaty to this very day.

Such a protective relationship, it has consistently been held by this Court, suffices in and of itself to place the property, activity, or other subject matter enjoying the special federal protection, under the *exclusive* jurisdiction of the

[14] The basic federal statute (R. S., sec. 2116, 25 U. S. C. 177), protecting Indian land rights, applies to every type of interest in land.

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold." (18 Op. Atty. Gen. 232, 237.)

United States. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Thomas*, 151 U. S. 577; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291; *Clairmont* v. *United States*, 225 U. S. 551; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Pelican*, 232 U. S. 442; *Perrin* v. *United States*, 232 U. S. 478; *Johnson* v. *Gearlds*, 234 U. S. 422; *United States* v. *Nice*, 241 U. S. 591; *Blanset* v. *Cardin, as Guardian*, 256 U. S. 319; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535.

Exclusive jurisdiction does not depend on the place where the property is located or the activity carried on. It exists as to the particular property, activity, or other subject matter under federal protection even though no Indian reservation is involved and even though the place and subject matter is fully subject to state power and law except for the Indian property or activities being carried on there under special federal protection provided for in a treaty or law of the United States. *The Kansas Indians, supra; United States* v. *Forty-Three Gallons of Whiskey, supra; United States* v. *Thomas, supra; United States* v. *Rickert*, 188 U. S. 432; *Tiger* v. *Western Invest-*

ment Co., 221 U. S. 286; *United States* v. *Pelican, supra; Perrin* v. *United States, supra; Johnson* v. *Gearlds, supra; United States* v. *Nice, supra; Blanset* v. *Cardin, supra; Sperry Oil & Gas Co.* v. *Chisholm, supra; United States* v. *McGowan, supra.* A similar situation exists where Indian reservations are involved, but where they are located on territory wholly subject to state jurisdiction except with respect to Indian property and activities carried on under federal protection. *United States* v. *McBratney*, 104 U. S. 621; *United States* v. *Kagama, supra; Draper* v. *United States*, 164 U. S. 240; *United States* v. *Celestine, supra; United States* v. *Sutton, supra; Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Pelican, supra; United States* v. *McGowan, supra.*

In the case at bar, the state Supreme Court has recognized (R. 17, 18) the absence of state jurisdiction over the fishing activities of the Indians at the fishing places which, though actually outside of the reservation, happened to be located in streams contiguous to its boundaries. We submit that it is equally true with respect to the usual and accustomed places outside the reservation and not contiguous to its boundaries. The protective interest of the United States evidenced in and by the Yakima treaty, extends to the restricted property rights and fishing activities of the Indians at all these places; and these rights and activities, in ac-

cordance with the rule established and applied in the cases just cited, are therefore under the *exclusive* jurisdiction of the United States. If, as may be conceded, power to regulate them exists at all outside of the Yakima tribal authorities, it can be exercised only by the Congress and not by the Legislature of the State of Washington.

The decision in *Kennedy* v. *Becker*, 241 U. S. 556, does not militate against this conclusion. In that case the Seneca Nation of Indians in 1797 conveyed certain land in the State of New York to Robert Morris by a grant which reserved "to them * * * and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Under an act of Congress in force at the time, it was unlawful for any white person to purchase land from the Indians unless the transaction was approved and ratified through a formal treaty with the United States. It was for this reason that this purely private transaction was approved and ratified by a treaty with the United States. No land was conveyed to the United States by the Indians under the treaty; nor were any rights guaranteed or secured to the Indians by the United States. All the United States purported to do and did do was to determine that the particular transaction between the Seneca Indians and Robert Morris was not inimicable to their interests and could therefore be given legal effect. The function performed by the United States under this treaty was no different than the

function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective. Once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (*In re Sanborn*, 148 U. S. 222, 227; *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.)

This is very different from the situation involved in the case at bar in which the Indians conveyed their land directly to the United States and in which the United States itself undertook a continuing obligation to secure to the Indians the fishing rights reserved for them under the treaty. In the *Becker* case no such basis existed for establishing that the State of New York was powerless to regulate the fishing by the Indians on the lands conveyed to Robert Morris; and no such suggestion was even made on behalf of the Indians. The contention of the Seneca Nation was that by virtue of its agreement with Robert Morris the Seneca Nation had reserved for itself exclusive power to regulate the exercise by its members of the fishing rights reserved under the grant. The opinion in the *Becker* case took special pains to point out the limited nature of this contention; and in deciding against its validity, the Court certainly did not foreclose the very different question involved in the case at bar, i. e., the question as to the exclusive jurisdiction, not of the Yakima Nation of Indians,

but of the United States, by reason, not of its mere stamp of approval on a conveyance by the Indians to a private person, but of its own participation in the Yakima treaty as the contracting party to whom the conveyance was being made and by whom the assurances of continued federal protection of the reserved fishing rights were being given.

The state's contentions (Br. pp. 54–59) concerning the effect of the admission of the Yakima Indians to citizenship were not adopted in the court below and should be rejected here. If this factor has any relevancy, it must be because in some way not clearly suggested by the state the attainment of citizenship curtailed the powers and responsibilities of the federal government with respect to the Yakima fishing rights or expanded the state powers or responsibilities in the same field. Neither of these possibilities is supportable under the decisions of this Court.

The thought that citizenship is incompatible with wardship so that the grant of citizenship terminates the guardianship relation of the federal government towards the members of an Indian tribe is found in a number of early cases, notably in *Matter of Heff*, 197 U. S. 488 (1905). This case, however, as the appellee recognizes (Br. pp. 57, 58), was expressly overruled in *United States* v. *Nice*, 241 U. S. 591 (1916), in which the Supreme Court declared:

> Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection (p. 598).

To the same effect are: *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Noble*, 237 U. S. 74, 79; *Williams* v. *Johnson*, 239 U. S. 414; *United States* v. *Sandoval*, 231 U. S. 28, 48; *Winton* v. *Amos*, 255 U. S. 373; *United States* v. *Boylan*, 265 Fed. 165 (C. C. A. 2d), app. dism. 257 U. S. 614 (1921); *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th); *Beck* v. *Flournoy Live-Stock and Real Estate Co.*, 65 Fed. 30 (C. C. A. 8th).

Just as the fact of citizenship does not impair federal constitutional powers, so it does not detract any force from the actual exercise of those powers. If the grant of citizenship to the members of the Yakima Tribe had the effect of dissolving the tribal relation, then conceivably it might be argued that a promise of fishing rights to the Yakima Tribe was deprived of its force with the dissolution of the tribe. But it has been held repeatedly that the grant of citizenship does not dissolve tribal relations. *United States* v. *Nice*, *supra*; *Tiger* v. *Western Investment Co.*, *supra*; *United States* v. *Boylan*, *supra*. Accord: *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th).

The question of state constitutional power is closely related to the question of federal constitutional power, and several of the cases already cited as showing the continuance of federal control over citizen Indians may also be cited as showing that the grant of citizenship does not confer upon a state any constitutional power to regulate, tax, or otherwise interfere with Indian property that is subject, as are the property rights in this case, to federal restrictions upon alienation. See for example *United States* v. *Nice, supra,* at pages 597–598; *United States* v. *Boylan, supra,* at page 174. To the same effect is *United States* v. *Rickert,* 188 U. S. 432 (1903), in which an injunction was issued, at the suit of the United States, to prevent the state taxation of lands, improvements, and personal property used in connection with such lands, in which Indians allotted under the general allotment act, and therefore citizens, had a beneficial interest. And see *United States* v. *Sutton,* 215 U. S. 291, 295–296, in which the Supreme Court held that the protective relation of the federal government to the Yakima Indians had not been impaired by the conferring of statehood on Washington, and that the "police power" of the state did not supersede federal protection.

The foregoing considerations compel the conclusion that the citizenship of the Yakima Indians does not serve to confer upon the State of Washington any power to control, regulate, or interfere with restricted property which is under the pro-

tection of the federal government, such protection having been promised by solemn treaty and implemented by federal legislation.

It is equally plain that the conferring of citizenship does not bring the Yakima Indians within the application of any state laws that did not apply to them before they were citizens. The fact of the matter is that citizenship is no part of the offense, under state law, of which the appellant has been convicted. The law applies, on its face, to aliens as well as citizens. Therefore the citizenship of the appellant has nothing to do with the case. Certainly it has no bearing upon the questions of state power or state law. And we have already seen that it has no bearing upon the question of federal power or federal law.

CONCLUSION

It is submitted that the judgment appealed from should be reversed.

Respectfully,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior.

The Solicitor General authorizes the filing of the foregoing brief prepared on behalf of the appellant, an Indian ward, by the Solicitor for the Department of the Interior.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

APPENDIX

STATE STATUTES INVOLVED

The state statute, the validity of which is directly involved, is referred to in the record as Section 5703 of Remington's Revised Statutes of Washington (vol. 7, 1940 pocket supp.). This is a codification of Chapter 149 of the Session Laws of the State of Washington of 1937 (1937 Wash. L., pp. 529–534), which, so far as pertinent, provides:

> SECTION 1. That section 51 of chapter 31 of the Laws of 1915 as amended by section 1, chapter 63, of the Laws of 1921, be amended to read as follows:
>
> SEC. 51. Licenses herein required shall be issued to any qualified person, firm, or corporation, by the director of licenses, or his duly authorized deputy, upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose, accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be endorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries. All applications for licenses shall be filed with the state treasurer, accompanied by the proper fees, which shall be respectively as follows:
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> * * * * *
>
> For each dip bag net license for the taking of salmon on the Columbia River, five dollars ($5.00);
>
> * * * * *

SEC. 2. This act is necessary for the support of the state government and its existing public institutions, and shall take effect March 31st, 1937.

In addition, sections 5693 and 2266 of Remington's Revised Statutes of Washington are relevant. These respectively provide as follows:

SEC. 5693. *Fishing without license prohibited.*—It shall be unlawful to catch, take, or fish for food fish with any appliance or by any means whatsoever except with hook and line commonly called angling or trolling, unless license so to do has been first obtained from the commissioner.

* * * * * *

Any person who shall engage in fishing with any appliance whatsoever without having first obtained a license or made lawful application therefor shall be deemed guilty of a misdemeanor and the commissioner is hereby authorized to seize said appliance and the same shall be confiscated to the state [L. '15, p. 81, sec. 41].

SEC. 2266. *Punishment of misdemeanor when not fixed by statute.*—Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars [L. '09, p. 894, sec. 14].

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